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COURT OF CRIMINAL APPEALS
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PD-1049-16

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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TEODORO HERNANDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

APPELLANT'S MOTION FOR REHEARING

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ORAL ARGUMENT RESPECTFULLY REQUESTED

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES Teodoro Hernandez, Appellant in this cause by and through his attorney, Karen Oprea, and, pursuant to the provisions of Tex. R. App. Proc. 79, moves this Court for a rehearing, and in support will show as follows:

GROUNDS FOR REHEARING

1. **The Court errs in removing language from the indictment first, before assessing whether it is material.**

2. **Under the Due Process Clause, the Court's sufficiency review must be grounded in the factual theory actually presented to the jury.**

3. **The Court's holding violates the Due Process Clause because it makes the nature of the accusation depend on the verdict.**

4. **The Court violates the Double Jeopardy Clause by ignoring the preclusive effect of an acquittal.**

5. **Under the Fifth Amendment, the Court must account for the fact that the assault was not charged or tried as a continuous crime.**

6. **The Court's holding violates the due process right to notice and the right to prepare a defense.**

ARGUMENT

1. The Court errs in removing language from the indictment first, before assessing whether it is material.

The Court diverges from the "hypothetically correct jury charge" doctrine by assuming language in the indictment is immaterial without conducting the analysis to determine whether its removal would affect the unit of prosecution.

Under the hypothetically correct jury charge doctrine a reviewing court examines a factual allegation in the indictment and compares that allegation with what was proven at trial. *Byrd v. State*, 336 S.W.3d 242, 246-48, 252-53 (Tex. Crim. App. 2011). This analysis requires comparing the actual allegation in the indictment with what was proven. *Id.* at 252-53 (in theft case, the question is whether the name in the indictment and the name proven at trial represent different victims). If the two represent different units of prosecution, the allegation is material. *Id.* at 257.

Applied to these facts, the question is: If we remove striking with hands and replace it with choking with hands, was a different crime proven than pled? The answer is yes. There was evidence of two assaults at trial, representing two units of prosecution. The first assault was an injury that resulted from striking. 5RR at 77;

CR at 66. The second assault was an injury that resulted from choking.[1] 5RR at 80-81; CR at 66. Removing the striking and replacing it with choking switches units of prosecution.

The indictment itself shows the truth of this. The indictment alleges two units of prosecution, one for a striking assault (Count II) and one for a strangulation assault (Count III). CR at 66. When the Court removes striking from Count II and inserts strangulation, it changes the assault allegation in Count II into the assault allegation in Count III. In other words, it makes the hypothetically correct jury charge for Count II allege a different assault than the one in Count II of the indictment.

Thus, by skipping the vital first step—by never comparing the actual language in the indictment with the proof offered at trial—the Court fundamentally changes the required analysis. It edits the language in the indictment to remove the factual allegation *first*, before determining whether the allegation was material. Its analysis looks like this: because we already know from *Johnson v. State* that the manner and means was immaterial, the allegation in the edited indictment does not show a different crime than the one proven at trial. *Hernandez v. State*, No. PD-

[1] In this motion, "choking" or "strangulation" are used as short hand for "applying pressure to the person's throat or neck or by blocking the person's nose or mouth." Tex. Penal Code § 22.01.

1049-16, 2017 Tex. Crim. App. LEXIS 1002, at *14-15 (Crim. App. Oct. 18, 2017).

But *Johnson* does not hold that manner and means is always immaterial. Rather, the manner and means are immaterial when they do "not define or help define the allowable unit of prosecution" for the offense. *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012). Here the manner and means do define the unit of prosecution. It was only by looking at the manner and means that the litigants were able to distinguish one unit of prosecution from the other. CR at 66. Unlike the case in *Johnson*, those allegations defined the injuries in Counts II and III and therefore the units of prosecution.

The Court should grant a rehearing in this case. Its reasoning alters the "hypothetically correct jury charge" doctrine in a way that does not protect defendants' due process or double jeopardy rights. At its heart the doctrine has been, and should continue to be, concerned with whether a defendant has notice of the particular crime with which he was charged and will be protected from subsequent prosecution again for the same crime. *Byrd*, 336 S.W.3d at 248. In the case it bar, the Court does neither. It not only deprived Hernandez of notice, it also leaves him open to re-prosecution for the offense of striking Molien with his hands because, under the Court's holding, that crime was neither pled in the indictment,

nor was it the basis for his conviction at trial. Yet, in reality he was both charged with, and convicted of, striking Molien. CR at 66, 91.

2. Under the Due Process Clause, the Court's sufficiency review must be grounded in the factual theory actually presented to the jury.

a. The issue here is sufficiency, not inconsistent verdicts, and the Court must take the acquittal in Count III into account.

The majority does not acknowledge a key fact in this case: that Hernandez was acquitted of the same strangulation assault on the basis of which the majority upholds his conviction. *Hernandez*, Tex. Crim. App. LEXIS 1002, at *1-15. Because it does not acknowledge the acquittal for strangulation, it does not provide any judicial reasoning to explain how it could be that the acquittal is irrelevant to the outcome of this appeal. *Id.* However, the concurrence indicates that the acquittal is irrelevant because of the rule that inconsistent jury verdicts are not barred. *Id.* at 26-27 (Richardson, J., concurring).

It is well-established that a conviction on one count cannot be attacked because it is inconsistent with an acquittal on another count. *United States v. Powell*, 469 U.S. 57, 64-66, 105 S. Ct. 471 (1984). The reason for this is that it is impossible to know the jury's true factual finding when it has voted both ways on the same question. *Id.*

But, critically, the verdicts on the assault counts at issue here were not inconsistent. Hernandez was tried and convicted under Count II for causing an

injury by striking Molien's head or body with his hands. CR at 66 (indictment charging that Hernandez hit Molien's head or body with his hands), 80 (jury charge), 91 (verdict form, finding guilty as alleged in the indictment). Hernandez was tried and acquitted under Count III for impeding Molien's airway by strangulation. CR at 66 (indictment alleging strangulation), 84-85 (jury charge on strangulation), 92 (acquittal of assault by strangulation). The indictment was brought and the case was tried on the theory that Hernandez caused two separate injuries in two separate assaults. *Id.*; 5RR at 77, 81. The jury believed one of those was proven and the other wasn't. CR at 91-92. Those verdicts are consistent.

Rather, it is the Court, not the jury, that creates inconsistent verdicts in its appellate review. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *13-15. It does this when it says that Hernandez was actually convicted of strangulation assault under Count II, while acquitted of strangulation assault under Count III. *Id.*

But there is a constitutional barrier to this sort of reasoning. In its appellate review, the Court is bound to the theory upon which each count was actually presented to the jury at trial.

b. A sufficiency review must take into account the theory that was actually presented to the jury.

The Court edits out the "striking" language in the indictment and says that all that matters to Count II is that Hernandez caused an injury. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *13-15. But it forgets that two assaults were

alleged. CR at 66. If the indictment is to provide any meaningful notice at all, it must provide notice of which assault is alleged in each count. And, by extension, the Court must consider how those counts were actually tried and what theory formed the basis for the jury's verdict.

"Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8, 111 S. Ct. 1807, 1815 (1991). In other words, a sufficiency review cannot become so hypothetical that it disregards the theory that was actually presented to the jury and formed the basis for its verdict.

In *Dunn v. United States*, the defendant was charged with making an inconsistent statement at a grand jury proceeding. *Dunn v. United States*, 442 U.S. 100, 104-05, 99 S. Ct. 2190 (1979). The indictment said the proceeding took place on September 30th. *Id.* The jury charge told the jury to decide whether the defendant made an inconsistent statement at "any" grand jury proceeding. *Id.* at 106, n.4. The jury convicted. *Id.* at 104. It turned out that the September 30th proceeding was not a grand jury proceeding, yet there was also evidence at trial that the defendant made an inconsistent statement at a grand jury proceeding on October 21st. *Id.* at 104-05.

The U.S. Supreme Court said the appellate court was not allowed to switch September 30th with October 21st. *Id.* at 106-07. This was because the sufficiency review must take into account "the basis on which the jury rendered its verdict." *Id.* at 106. The Court identified the basis of the verdict by looking at what issues were obviously submitted to the jury: although the charge permitted a conviction on "any" proceeding, the arguments of the State and the trial court's reference to the charges in the indictment showed that the defendant was tried on the September 30th theory. *Id.* at 106-07, 106 n.4. Thus, the jury rendered its verdict based on the September 30th theory. *Id.*

The Court held, "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Id.* at 106.

Dunn is controlling here. The Court must ask on what factual theory Count II was actually tried and must use that theory as the basis for its sufficiency review. The fact that the two assaults could have formed the basis for a verdict is not controlling. What is controlling is the assault that *did* form the basis for the verdict. This Court's surmise that the two assaults were "the same" does not justify

disregarding the way they were actually charged and tried. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *14-15.

Count II of the indictment accused Hernandez of striking Molien. CR at 66. Presented to the jury under Count II was evidence that Hernandez struck Molien and inflicted multiple bruises on her body. 5RR at 77. The jury's verdict was based on the charges in the indictment and it found him guilty "as alleged in the indictment." CR at 66, 91. Thus, the theory at trial was undoubtedly that Hernandez was guilty under Count II because he struck Molien.

The Court 'puts the cart before the horse' when it says that, because manner and means are immaterial to the hypothetically correct jury charge, it can uphold the conviction based on any assault that was proven at trial. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *14-15. This is exactly what *Dunn* says it cannot do. *Dunn*, 442 U.S. at 106-07. There, the appellate court could not characterize an allegation as a "nonprejudicial variance" and ignore the fact that that was the allegation submitted to the jury. *Id.* at 104-07. And it cannot put in its place an allegation that was not part of the jury's verdict. *Id. Dunn* mandates that this Court stick to the theory at trial. *Id.*

As applied to the Court's "hypothetical jury charge" doctrine, the *Dunn* rule is straightforward. With multi-count indictments for assault, the sufficiency review must identify which assault was charged and tried under each count. A variance

between the indictment and the trial theory may well be immaterial. *Johnson*, 364 S.W.3d at 298. But a variance between the indictment and the trial theory on the one hand and the hypothetically correct jury charge on the other must be considered material. *Dunn*, 442 U.S. at 106-07.[2]

The concerns expressed in *Dunn* implicate, not only due process, but also the right to notice and a fair trial. U.S. Const. amends. V, VI, XIV. This is not a case where, although the manner and means were slightly different, it was obvious to the defendant that Count II was accusing him of causing the strangulation injury. To the contrary, Hernandez (and every other participant at trial) believed he was being charged in two counts for inflicting two different injuries and he conducted his defense accordingly. *See, e.g.*, 8RR at 121-23 (the trial court, prosecutor, and defense counsel discussing Count II allegations). Count II was the injury that comes from striking. CR at 66. Count III was the injury that comes from strangling. *Id.* For this Court to uphold the conviction in Count II on a completely separate injury—and thus a completely separate assault—violates "the most basic notions of due process." *Dunn*, 442 U.S. at 106.

[2] The *Dunn* Court would say this is not a variance issue at all, but rather "a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained petitioner's conviction." *Dunn*, 442 U.S. at 105-06.

3. The Court's holding violates the Due Process Clause because it makes the nature of the accusation depend on the verdict.

The Court's holding produces a strange result. Under its holding, the hypothetically correct jury charge for Count II in this case depends on the jury's verdict on Count III.

Consider what the Court's sufficiency review would look like had Hernandez been convicted under Count III. In that case, there would be two assault convictions, one for a striking assault under Count II and one for a strangulation assault under Count III. *See* CR at 66.

If that were the case, the Court could not have upheld the Count II conviction on the basis of the strangulation evidence, because Hernandez would already have been punished for that assault under Count III. *Shelby v. State*, 448 S.W.3d 431, 439-40 (Tex. Crim. App. 2014). The Double Jeopardy Clause prohibits multiple punishments for the same crime. *Id.* at 435. Because the gravamen of aggravated assault and family violence assault is the same, a defendant cannot be convicted twice where the underlying assault is the same. *Id.* at 439 (assessing aggravated assault and intoxication assault).

Thus, if Hernandez had been convicted under Count III, the Court would be constrained to include the manner and means of the assault in the hypothetically correct jury charge. It would have to do this in order to identify different conduct

than strangulation that was being punished under Count II. *Shelby*, 448 S.W.3d at 435-36.

However, under the Court's holding, if Hernandez is *acquitted* of Count III, the Court is not constrained to include the manner or means of the assault in the hypothetically correct jury charge. As it says in this case, a reviewing court is free to consider any assaultive conduct in the record in sustaining the conviction, despite the existence of a second assault count in the indictment. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *14-15.

How can a defendant have adequate notice of the charges being brought against him if he cannot know until after the verdict is rendered what the accusation was? He cannot know this because the Court will read the language of the indictment differently, depending on the outcome. If he is acquitted on Count III, then Count II accused him of strangling Molien. But if he is convicted of Count III, then Count II accused him of striking her. In multi-count assault cases, this is insupportable under the Due Process Clause and the Sixth Amendment right to a fair trial. U.S. Const. amends. V, VI, XIV.

The Court has strayed from the principles that originally constrained the hypothetically correct jury charge doctrine. It is the demands of due process and double jeopardy that act as the bulwark of that doctrine. *Byrd*, 336 S.W.3d at 248.

It should reconsider its opinion to set the doctrine back in line with the federal constitution.

4. The Court violates the Double Jeopardy Clause by ignoring the preclusive effect of an acquittal.

As stated above, there was no inconsistent verdict between the assault counts. The basis for the verdict was clear: the jury believed Hernandez hit Molien but did not strangle her. CR at 66, 91-92. It is the Court's hypothetically correct jury charge, not the jury's verdicts, that creates an inconsistency.

Also, as set out above, the assault statutes under which Hernandez was charged are "the same" for double jeopardy purposes. *Shelby*, 448 S.W.3d at 438-39; Tex. Penal Code §§ 22.01, 22.02. Thus, if the underlying conduct is the same, two convictions under those statutes are forbidden.

Under the Court's holding, however, a defendant who has been *acquitted* of an assault at trial (in this case, Count III) can be convicted of the "same" assault on appeal (Count II). *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *10-15. The Double Jeopardy Clause forbids this. U.S. Const. amend. V. A judgment of acquittal provides more protection under the Double Jeopardy Clause, not less.

The order of events matters to the Double Jeopardy Clause. We know that jury verdicts that reflects a contradictory conclusion on the same fact at trial do not violate double jeopardy. *Powell*, 469 U.S. at 64-65. This is because it is impossible

to know whether the affirmative or negative finding reflected the jury's true factual determination. *Id.*

By contrast, if there was no contradictory verdict, appellate courts are constrained to give an acquittal its preclusive effect. *Yeager v. United States*, 557 U.S. 110, 119-23, 129 S. Ct. 2360 (2009). In other words, when it is clear that a jury verdict represents an acquittal, that finding is unreviewable and no criminal proceeding subsequent to the entry of the verdict can be premised on a contrary finding. *Id.*

Thus, the ultimate question for the double jeopardy analysis is whether the fact of an acquittal is clear from the verdict. *Id.* Here, the meaning of the jury's verdict is unequivocal. It rendered its verdicts based on what was alleged in the indictment. CR at 66, 91-92. It decided the charge that Hernandez hit Molien was proven, but the charge that Hernandez strangled her was not.[3] *Id.*

Because the acquittal by the jury was clear and not the result of an inconsistent verdict, the Court violates double jeopardy by entering a judgment of

[3] The mode of analysis set out in *Ashe v. Swenson* shows that the jury acquitted Hernandez of strangling Molien. *Ashe v. Swenson*, 397 U.S. 436, 444-45, 90 S. Ct. 1189 (1970). Under Count III, the jury had two issues to decide: 1) had Hernandez ever been in a dating relationship with Molien? and 2) did Hernandez impede the normal breathing or circulation of the blood of Molien by applying pressure to her throat or blocking her nose or mouth? Tex. Penal Code § 22.01(b)(2)(B). That Hernandez and Molien has been in a dating relationship was not an issue at trial—it was never undermined and both parties freely admitted that they had dated. 5RR at 61, 7RR at 115-16. Therefore, "[t]he single rationally conceivable issue in dispute before the jury" was whether Hernandez choked her. *Ashe*, 397 U.S. at 445.

guilt on the "same" crime for which Hernandez was acquitted. The Court's conclusion does not arise from the jury's verdict, but rather from its sufficiency review—a review that disregards the basis for the jury's verdict and inserts in its place a reassessment of the case under a different charge than the one upon which the verdict was based. The Court's review constitutes a subsequent proceeding at which the preclusive effect of the acquittal is in full force. *See Yeager*, 557 U.S. at 122-23 (finality of acquittal is "unassailable"). Accordingly, it should grant a rehearing in this case because to uphold Hernandez's conviction on the basis of conduct for which he was acquitted violates the Double Jeopardy Clause.

5. Under the Fifth Amendment, the Court must account for the fact that the assault was not charged or tried as a continuous crime.

Even if Hernandez could have been charged with one continuous assault in the case at bar, he was not charged that way. The State divided the assault into two separate counts in the indictment. CR at 66. That fact constrains this Court's sufficiency review. *See Byrd*, 336 S.W.3d at 246 (hypothetically correct jury charge must be authorized by the indictment).

a. Double jeopardy and continuous crimes.

If a crime is continuous, double jeopardy prohibits the State from dividing the crime into two separate counts. *Ex parte Hawkins*, 6 S.W.3d 554, 555 n.6 (Tex. Crim. App. 1999) *citing Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221 (1977).

If Hernandez had been charged with a continuous assault, the accusation of assault would be viewed as one event, beginning with the striking and ending with the strangulation. But the State decided to divide the assault up into two separate counts—one count for striking, one count for strangulation. CR at 66. That division allowed the jury to express which events along the continuum it believed were proven beyond a reasonable doubt.

The jury rendered an acquittal on one end of the continuum. It decided that the striking was proven, but the strangulation was not. CR at 91-92. In other words, the assault stopped when the striking stopped.

A verdict of acquittal is inviolate under the Double Jeopardy Clause. *Yeager*, 557 U.S. at 111; U.S. Const. amend. V. By upholding the conviction under Count II on the theory that the assault was continuous, the Court ignores a verdict of acquittal and violates the Double Jeopardy Clause. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *10-11. It should grant the motion for rehearing.

b. The *Dunn* rule and continuous crimes.

If the Court views the assault as continuous it must also consider the impact of *Dunn* and its progeny. *Dunn*, 442 U.S. at 106-07. "[S]imply because the facts necessary to support [a] theory were presented to the jury" does not mean that theory can be used to sustain his conviction. *McCormick*, 500 U.S. at 270 n.8.

The Court asks whether the facts of this case present a single assault. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *10-11. But, to look at this case that way ignores both the indictment and the theory of the case presented to the jury, namely, that they were separate assaults. CR at 66, 80, 84-85, 91-92. *Dunn* forbids that method of conducting a sufficiency review. *Dunn*, 442 U.S. at 106-07.

The continuous theory was not charged in the indictment. CR at 66. It was not presented to the jury. CR at 80, 84-85. And the jury did not it render its verdict on a continuous theory. CR at 91-92. Just because the State could have charged this assault differently, doesn't mean it did. And it doesn't empower a reviewing court to ignore both the indictment and the basis for the jury's verdict. *Dunn*, 442 U.S. at 106-07.

The Court should grant a rehearing in this case to reassess its alternative conclusion regarding assault as a continuous crime in light of the rule established in *Dunn*.

6. The Court's holding violates the due process right to notice and the right to prepare a defense.

Each of the Court's alternative holdings rely on the same faulty premise, namely, that the State at trial sought to convict Hernandez twice for the same assault in violation of the Double Jeopardy Clause. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *10-15. Under the Court's holding, Hernandez was either charged with a continuous crime that was impermissibly divided up into two

counts or he was charged for the same strangulation assault in two separate counts. *Id.*; *Shelby*, 448 S.W.3d at 435; *Hawkins*, 6 S.W.3d at 555 n.6.

Plainly, neither of those things happened at trial. Hernandez was charged and tried for two discrete assaults, each of which constituted a separate offense. CR at 66, 80, 84-85. But the Court now reads this charging instrument to allege two identical crimes. Neither the trial judge, the prosecutor, nor Hernandez had any notice that this was happening.

Both the Texas and United States Constitutions protect the right to sufficient notice of the charges that are being brought. U.S. Const. amends. V, VI, XIV; Tex. Const. art. I, § 10. "[T]he charging instrument must be specific enough to inform the accused of the nature of the accusation against him so that he may prepare a defense." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004).

The Court's reading of the indictment does not allow "a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged…" Tex. Code Crim. Proc. Art. 21.11. *Hernandez*, 2017 Tex. Crim. App. LEXIS 1002, at *14-15 (stating that all indictment pled was that Hernandez caused an injury, editing out the allegation that he struck her face and body with his hands).

Had Hernandez known he was being charged twice for the same crime, he could have filed a pretrial motion to quash on double jeopardy grounds. *See Saenz*

v. State, 166 S.W.3d 270, 274 (Tex. Crim. App. 2005) (double jeopardy violated when defendant charged with three counts of capital murder that each relied on the same murders). That motion would have been successful. But, he had no notice that this was happening and therefore had no opportunity to file such a motion.

Altering the nature of the charges on appellate review confounds the ability to prepare a defense to a degree that the due process clause and the right to a fair trial do not countenance. U.S. Const. amends. V, VI, XIV. Had a motion to quash been filed, the State would have moved forward with a different charge than it did. The trial would have been different, including the strategies and arguments of counsel. Through no fault of Hernandez, it is impossible to know what the trial record would look like had that happened. But, we can know that a sufficiency review that creates this result cannot be consistent with the federal constitution.

PRAYER FOR RELIEF

Hernandez asks the Court to consider the issues presented in this appeal in light of the verdict of acquittal in Count III and to provide judicial reasoning explaining the impact of that verdict on its sufficiency review. After reconsidering its opinion, he prays that the Court would hold that the evidence was insufficient to sustain his conviction for aggravated assault. He prays for this and any other relief justice requires.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 4,479 words (excluding the caption, table of contents, table of authorities, statement of grounds for rehearing, signature, certificate of service, and certificate of compliance). This is a computer-generated document using at least 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Karen E. Oprea
Karen E. Oprea
Attorney for Appellant
Teodoro Hernandez

CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of the foregoing MOTION FOR REHEARING, was e-served to the office of the State Prosecuting Attorney and e-served to the Hays County Criminal District Attorney's Office, on November 1, 2017.